

Capacity to consent to medical treatment



Capacity is defined as the patient's ability to make decisions. General principles relating to patient capacity to consent to treatment and guidance on what to do if a patient lacks capacity.

What is capacity?

- ▶ Capacity is the ability to make decisions.
- ▶ To have capacity a patient must be able to:
 - Understand the facts involved and the nature of the decision to be made
 - Weigh up the consequences of the decision and the risks and benefits of their choice
 - Communicate their decision.
- ▶ Capacity is not all or nothing: a patient may have capacity to make some decisions, but not others. For example, a patient might be capable of making medical decisions even if they are not capable of managing their finances. Likewise, a patient may be capable of consenting to simple medical treatment (such as taking an antibiotic) but not major procedures (such as major surgery).
- ▶ Capacity is therefore specific to the situation and the decision being made.
- ▶ A patient does not lack capacity simply because you disagree with their decision or because they do not consent to the treatment that you are recommending.
- ▶ An adult aged 18 years and over is presumed to have capacity until proven otherwise.
- ▶ Diseases and disorders can impair a patient's cognitive function and can compromise their capacity to make a treatment decision.
- ▶ It is up to the doctor to assess whether a patient has the capacity to make the particular treatment decision under consideration.

What if a patient does not have capacity to make the decision?

- ▶ If a patient lacks capacity to make a decision about treatment, then consent needs to be obtained from an appropriate substitute decision-maker (subject to limited exceptions).
- ▶ Legislation in each state and territory outlines the legally appropriate substitute decision-maker to give consent to medical treatment on behalf of a patient who lacks capacity.
- ▶ Generally the legislation lists a hierarchy of people who can act as the substitute decision-maker. This list includes the patient's guardian (if one has been appointed), spouse or de facto partner, family member or close friend. In some states there are different requirements for consent for tissue and organ transplantation.
- ▶ The 'next of kin' has no legal standing so is not necessarily the legally appropriate substitute decision-maker.
- ▶ Treatment can generally be given without consent in an emergency (although in the end of life context, if a patient has a valid advance care directive (ACD) refusing certain types of treatment, the ACD must be respected).
- ▶ Consent to certain treatments (for example, sterilisation procedures) for patients without capacity must be obtained from the court or tribunal.

More information

For information about the regime in your state or territory refer to the appropriate authority below.

ACT

Public Advocate of the ACT
visit publicadvocate.act.gov.au

NSW

Public Guardian in New South Wales
visit publicguardian.justice.nsw.gov.au

NT

Office of the Public Guardian in the Northern Territory
visit health.nt.gov.au/professionals/office-of-the-public-guardian

QLD

Office of the Public Advocate
visit justice.qld.gov.au/public-advocate

SA

Office of the Public Advocate in South Australia
visit opa.sa.gov.au

TAS

Office of the Public Guardian in Tasmania
visit publicguardian.tas.gov.au

VIC

Office of the Public Advocate in Victoria
visit publicadvocate.vic.gov.au

WA

Office of the Public Advocate in Western Australia
visit publicadvocate.wa.gov.au

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